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IN THE
Supreme Court of the United States

OCTOBER TERM 1977

No.

77-238

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

RICHARD BERT MOSLEY,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Michigan

MEMORANDUM FOR RESPONDENT IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

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Respondent was charged with the commission of the offense of murder in the first degree. It was charged that he killed his victim in an armed robbery or in an attempt to perpetrate an armed robbery, a felony murder.

Respondent was arrested without warrant three months after the alleged crime was committed. The arresting officer testified that he received an anonymous telephone

call that several persons, including the defendant, were holding up places on the lower east side of Detroit and the caller mentioned the name of the deceased victim in this case.

During an evidentiary hearing in the trial court on respondent's motion seeking to suppress his confession, the arresting officer testified on direct examination by the prosecutor as follows:

'Q. What information did you have that prompted you to arrest Richard Bert Mosley on that particular date?

'A. It was some time during the first week in April, got an anonymous phone call from - that - and the party gave me the name of several persons that were operating on the lower east side, holding up places and that, and the name of Richard Mosley and another party - two other men, I believe - that the information was that they had held up --'

[See dissenting opinion of Maher, J, in Michigan Court of Appeals, page 17 of Petitioner's Petition.]

On cross-examination, the arresting officer testified as follows:

'Q. At the conclusion of your conversation with this anonymous telephone caller, did you apply to any judge or magistrate for a warrant of arrest for Mr. Mosely?

'A. No, sir.

'Q. For what offense specifically did you arrest Mr. Mosely at 1:05 p.m. or thereabouts on April 8th of 1971?

'A. For investigation of the robbery armed of the Blue Goose Bar and the White Tower Restaurant on Mack.

'Q. Was the White Tower Restaurant mentioned to you during your telephone conversation with the anonymous caller?

'A. Yes.

'Q. And the Blue Goose Bar also?

'A. Yes.

'Q. Would it be fair, Sergeant Cowie, that you arrested Mr. Mosely on April 8th of 1971, solely and exclusively on the information that you recieved from this ananymous telephone caller?

'A. Yes.' [See dissenting opinion of Maher, J, in Michigan Court of Appeals, pages 17-18 of Petitioner's Petition. Emphasis supplied.]

It was only after an over-night recess in the evidentiary hearing, that the arresting officer came up with testimony concerning 'pattern sheets' on armed robberies.

[See dissenting opinion of Maher, J, in Michigan Court of Appeals opinion, page 18, Petitioner's Petition.]

The arresting officer did not take respondent before a magistrate after arresting him at 1:00 p.m. because, he testified, he felt that he needed more information before he could apply for a warrant and because he hadn't completed his investigation. (E31) *

* The E in the parentheses refers to the transcript of evidence adduced during the evidentiary hearing in the trial court on respondent's motion to suppress his confession; the numbers, to the pages within.

Upon his return to police headquarters with respondent, the arresting officer questioned respondent about several robberies, not including the robbery in question in this case. During this questioning period and after he had been advised of his *Miranda* rights and signed a form acknowledging that he had been told of his *Miranda* rights, respondent declined to answer *any questions about robberies*.

After the arresting officer had completed his questioning of respondent, the officer turned respondent over to another officer of the Detroit Police Department who was assigned to the homicide section. It is unclear from the transcripts whether the arresting officer had told the second officer that respondent had declined to answer any questions about robberies.

The second homicide officer gave respondent his *Miranda* rights and respondent signed a form acknowledging that such were given to him. The officer then told respondent that his purported accomplice had confessed and implicated respondent, putting respondent on the trigger, and that respondent faced a life term. Respondent then gave a purported confession.

It is interesting to note that Detective Hill, contrary to the assertion in Petitioner's Petition at page 5, testified on cross-examination on the evidentiary hearing as follows:

'A. I talked to Anthony Smith some time between 4 p.m. and some time after 4 p.m. and before 6:35 p.m. on the 8th of April. And we talked to him again and took a statement the next morning.

'Q. It's your testimony, then, sir, that you took a formal written so-called statement from Anthony Smith on April 9th?

'A. Yes, sir.' (E115)

[It is apparent to anyone who knows police interrogation technique that Sgt. Hill faked respondent by telling him that Smith had confessed, and that after Hill got respondent's confession in writing, Hill went to Smith the next morning, the 9th, and showed Smith respondent's confession and as a result, Smith confessed. This is evident from the fact that Hill had no explanation for the variation in his procedures: Smith confessed on the 8th but his confession was not reduced to writing; respondent confessed on the 8th and his confession was reduced to writing; on the morning of the 9th, Smith was shown respondent's written confession and Smith's written confession was obtained. (E117)]

It must also be remembered that Anthony Smith's name was mentioned in the anonymous telephone call (E12), and that Anthony Smith was arrested on the same day as was respondent and was interrogated by the arresting officer alternately with respondent although Smith and respondent were not questioned in each other's presence (E36).

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The Michigan Supreme Court found in *People v Mosley* (After Remand), 400 Mich 181, 183 (1977) as follows:

'The record of the testimony taken at defendant's *Walker* hearing (see *People v Walker* [On Rehearing], 374 Mich 331 [1965]), discloses that the police lacked probable cause to arrest defendant and that the people failed to sustain the burden of showing that the confession was free of the primary taint of defendant's illegal arrest.'

In *Brown v Illinois*, 422 US 590, 600 (1975), this Court pointed out that:

'That Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun*, whether Brown's statements were obtained by exploitation of the illegality of his arrest.'

In the case at bar, the Michigan Supreme Court resolved the question, as is evident from the above quote from the opinion of the Michigan Supreme Court.

In *Brown v Illinois*, *supra*, at 605, this Court pointed out:

'The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning". App. 35, 43, 78, 81, 83, 88, 89, 94. The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.'

In the case at bar, the arresting officer testified at the evidentiary hearing that he arrested respondent 'solely and exclusively on the information that [he] received from this anonymous telephone caller' (E27); that he, the arresting officer, arrested respondent '[f]or investigation of the robbery armed of the Blue Goose Bar and the White Tower Restaurant' (E26); that he, the arresting

officer, while he had respondent in custody on the day of his arrest, did not request the issuance of an arrest warrant for respondent for the robbery of the Blue Gose Bar '[b]ecause it was learned that he wasn't involved in the robbery of the Blue Goose Bar' (E31); that he, the arresting officer, while he had respondent in custody shortly after his arrest, did not apply for a warrant of arrest for respondent for the robbery of the White Tower Restaurant because '[a]t 2:15 I hadn't had time to talk to him' (E31) and that he felt 'that [he] needed more information, before [he] could apply for a warrant for the armed robbery of the White Tower Restaurant' (E31); that he, the arresting officer, did not take respondent after his arrest before some judge in Recorder's Court [across the street from police headquarters where respondent was being held in custody] '[b]ecause [he] hadn't completed the investigation at 2:30' (E33); and that he, the arresting officer, after respondent had declined to answer any questions (E38), turned respondent over to Sgt. Hill 'for further questioning in the Leroy Williams thing' (E39) because he, the arresting officer, 'wasn't in charge of that investigation' (E39).

Sgt. Hill testified at the evidentiary hearing that after the arresting officer had interrogated respondent, he took respondent to the Homicide Section '[f]or interrogation' (E82) and that the arresting officer 'was turning [respondent] over to us for investigation regarding murder' (E84).

Hence, it is clear that in the case at bar, respondent was consciously arrested by the police and kept in custody specifically for the purpose of 'investigation' and for 'questioning'.

It is also clear that Sgt. Hill, the officer who obtained respondent's confession proceeded in calculated manner

to surprise, frighten and confuse respondent. Sgt. Hill testified at the evidentiary hearing that when he took Anthony Hill's oral statement before interrogating respondent, he did not think that 'we had a confession of guilt' from Smith (E129), but that nonetheless Sgt. Hill told respondent 'that Anthony Smith had confessed and implicated' respondent (E130); that Sgt. Hill had 'done it a lot of times when there has been no confession' (E130); that in response to the trial court's question whether Sgt. Hill 'was going to trick [respondent] into' confessing, Sgt. Hill said 'Well, I would tell them their partners have confessed' (E130), that 'I don't always tell a prisoner the truth' and that 'I would tell him [the prisoner] sometimes we have their fingerprints, and we don't have it, or something along this nature' (E131).

It can fairly be said that petitioner concedes that the arrest of respondent was illegal.

The question then is the precise question posited in *Wong Sun v United States*, 371 US 471, 488 (1963):

'[T]he more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint".'

In *Commonwealth of Pennsylvania ex rel. Craig v Maroney*, 348 F2d 22, 29 (CA3 1965), the Court said:

'There are two factors which seem to be of major significance in determining the relationship between an illegal arrest and, as here, the subsequent confession:

(a) the proximity of an initial illegal custodial act to the procurement of the confession; and

(b) the intervention of other circumstances subsequent to an illegal arrest which provide a cause so unrelated to that initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest.'

Applying these criteria, the Court in *United States ex rel. Gockley v Myers*, 450 F2d 232, 236 (CA3 1971), in ordering the suppression of the defendant's confession obtained during a custodial questioning following an illegal arrest, said:

'The arrest of Gockley on November 17 was much more than a *causa sine qua non* of his November 19 statement during the resulting detention. The record compels the conclusion that the very purpose of the arrest on a charge of forgery was to obtain and maintain such control over him as would facilitate persistent and effective interrogation about the disappearance of Smith and Miss Klein. This deliberate misuse of arrest is underscored by the fact that Gockley was never granted an arraignment or a bail hearing on the forgery charge. . . . Moreover, much of the questioning was addressed to the obtaining of information about the disappearance of Smith and Miss Klein, rather than the forgery charge upon which he never was prosecuted.'

In the case at bar, it should be noted, the confession followed in a matter of hours after the illegal arrest, not two days later, and that the arresting officer did not release respondent after the officer knew he had insufficient evidence to obtain a warrant on the charges for which he had arrested respondent and after respondent declined to answer any questions, but rather, the arresting officer continued respondent in custody and deliberately turned him over to another officer specifically for questioning in connection with a murder for which respondent was not arrested.

In *Hale v Henderson*, 485 F2d 266, 268 (CA6 1973), cert denied 415 US 930, the district judge found that the arrest of petitioner was illegal but that his confession was not the product of the illegal arrest because it was made approximately 42 hours after the arrest and after petitioner had talked privately with his wife and had been confronted with all of the witnesses, but the Court found otherwise:

'In our instant case there was no break in custody (and apparently little break if any in custodial interrogation, . . . prior to petitioner's confession. Contrary to the holding of the District Judge, we do not believe that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint'." *Wong Sun v United States*, *supra* . . . The confrontations which preceded the statement were made possible by and were a product of the illegal arrest.'

In the case at bar, the confronting of respondent by Sgt Hill with the information that Anthony Hill had incriminated respondent - whether it was a trick by Hill

or whether Anthony Hill had actually made that statement at that time - was made possible by the illegal arrest of respondent and was a product of that illegal arrest.

In *United States v Edmons*, 432 F2d 577, 583, 584 (CA2 1970), where the defendants sought to suppress identifications obtained as a result of their illegal arrests, the Court in ordering the suppression of the identifications, said:

'The arrests here violated the Fourth Amendment not because law enforcement officers crossed the line, often a shadowy one, that separates probable cause from its lack, but because they deliberately seized the appellants on a mere pretext for the purpose of displaying them to the agents who had been present at the scene of the crime.

* * *

'Here the illegal arrests produced the precise results for which they were designed. When the police, not knowing the perpetrator's identity, make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before the victim and with a view toward having any resulting identification duplicated at trial, the fulfillment of this objective is as much an exploitation of "the primary illegality" as where a defendant is arrested without probable cause in the expectation that a search or the taking of fingerprints . . . will yield evidence that will convict him of a crime and the illegally seized objects or fingerprints are introduced at trial.'

And in the case at bar, the illegal arrest of respondent produced the precise result for which it was designed, and the illegality of the arrest of respondent was not the crossing of the line, often a shadowy one, between probable cause and its lack, but was based solely on an anonymous telephone call, and the illegal detention of respondent was continued after it was clear that there was no evidence against him on the charges for which he was arrested for the specific purpose of his being questioned about the murder to which his confession related.

This Court in *Brown v Illinois, supra*, stated that the burden was on the prosecution to show that the confession was admissible.

The Michigan Supreme Court, after considering the record made in the case in the trial court, determined that 'the people failed to sustain the burden of showing that the confession was free of the primary taint of defendant's illegal arrest'. 400 Mich at 183.

This determination was patently correct.

Therefor, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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